In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1981

LENA GLIMCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks to invoke Section 6013(e) of the Internal Revenue Code of 1954, to obtain relief from a decision of the United States Tax Court which had become final more than two years before the statute was enacted. Section 6013(e), known as the "innocent spouse" statute, relieves certain spouses of tax liability attributable to income omitted by the other spouse from a joint income tax return.

The Tax Court (26 T.C.M. 547) had held in the prior case in 1967 that petitioner and her husband Joseph P. Glimco were jointly liable for deficiencies in income tax of approximately $200,000 for the years 1954 through 1957. The court of appeals affirmed (397 F. 2d 537), and this Court denied certiorari (393 U.S. 981). Subsequently, on January 12, 1971, Congress added Section 6013(e) to the Code.[1]

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[1]P.L. 91-607, 84 Stat. 2063.

In this case, which arose as a collection action commenced by the government in the United States District Court for the Northern District of Illinois against petitioner for the deficiencies upheld in the prior action, petitioner raised Section 6013(e) as a defense. Both the district court and the court of appeals rejected petitioner's claim under Section 6013(e) and entered judgment for the government (Pet. App. A 1-5).

2. The innocent spouse provision does not apply to the deficiencies determined against petitioner. As the court of appeals correctly recognized, the legislative history of Section 6013(e) specifically states (S. Rep. No. 91-1537, 91st Cong., 2d Sess., p. 4):

> The bill, of course, does not open a year which has been closed by the statute of limitations, *res judicata*, or otherwise. [Emphasis added.]

The decision below is in accord with the legislative history and with other decisions which have also refused to apply the statute to reopen closed taxable years. See *e.g.*, *United States* v. *Zimmerman*, 478 F. 2d 59 (C.A. 7); *United States* v. *Maxwell*, 459 F. 2d 22 (C.A. 5); *Sylk* v. *United States*, 331 F. Supp. 661 (E.D. Pa.).

These interpretations of the statute fully implement the congressional purpose. As this Court pointed out in *United States* v. *Zacks*, 375 U.S. 59, 65-68, "It is abundantly clear that Congress is aware of the limitations problem as it affects retroactive tax legislation" (*id.* at 65) and that Congress can, and on occasion does, include a provision expressly reopening barred tax years when it is enacting an amendment to the Internal Revenue Code. However, where as here, no such provision is included and the legislative history demonstrates the congressional intent not to reopen closed years, even a "remedial"

amendment cannot be read so broadly as to include relief which Congress chose to withhold. *United Sates* v. *Zacks*, *supra*, 375 U.S. at 68. Accord, *New York, Chicago and St. Louis Railroad Co.* v. *United States*, 331 F. 2d 865, 874 (Ct. Cl.).

Petitioner argues (Pet. 8, 10) that *res judicata* does not apply to this suit because she is not seeking to relitigate the correctness of the amount of tax as determined by the Tax Court, but, rather, to interpose a newly authorized defense to the liability. But once its jurisdiction is properly invoked, the Tax Court has the authority to "redetermine the correct amount of the deficiency" (Section 6214(a)), and that redetermination includes not only the amount of tax due but also the persons liable for it. The Tax Court's decisions, if not appealed or when finally affirmed on appeal, are binding adjudications which may not be reopened in a district court. *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620; *Schaffner* v. *Bingler*, 268 F. 2d 76 (C.A. 3); *United States* v. *Zimmerman*, *supra*, 478 F. 2d at 62.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.

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